The acquisition and loss of nationality and the African Charter on Human and Peoples' Rights

THE ACQUISITION AND LOSS OF NATIONALITY AND THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS :

LESSONS FROM THE EUROPEAN EXPERIENCE

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The right to have a nationality is one of the most important rights which a human being needs in order to enjoy fundamental human rights. Often, several human rights of stateless persons are violated. Also, certain human rights of persons who do not possess a specific nationality are violated. For example, a person who does not possess the same nationality as his or her family members is sometimes deprived of the right to live together in one and the same country as the family members.

It is therefore not surprising that the right to a nationality is guaranteed in many international documents. The right is stressed by Article 15(1) of the UNIVERSAL DECLARATION OF HUMAN RIGHTS of 1948. It is remarkable that the provision does not explicitly guarantee the right to a nationality. Article 15(1) only addresses the question of nationality in very general terms. Article 15(2) of the Universal Declaration is a bit more specific. The provision states that no one shall be arbitrarily deprived of his or her nationality nor be denied the right to change his or her nationality. This formulation still leaves room for discussion as to whether or not in a given case the deprivation of one's nationality is arbitrary or not. It is important to note that the Universal Declaration is not binding since it was not put into the form of an international treaty. In spite of this, the importance of the Declaration as a moral guideline for the interpretation of both international treaties and national legislations can hardly be overemphasized.

The right to a nationality is elaborated in other international treaties initiated by the United Nations. The 1961 CONVENTION ON STATELESSNESS is of significance. The convention attempts to develop rules aimed at reducing situations in which persons become stateless. However, the Convention only establishes a right to acquire a specific nationality in very exceptional circumstances.

The INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION of 1966 is also worth noting. Article 5 of the convention calls for the prohibition and elimination of racial discrimination in all its forms. It imposes an obligation on states to guarantee the right of everyone, without distinction as to race, colour, national or ethnic origin. Individuals are entitled to equal protection of the laws. Several rights are listed to this effect. Notable among these is the right to nationality (sub d, point iii). As a result of this obligation, racial discrimination with respect to the acquisition or loss of nationality is strictly prohibited. Regulations regarding the acquisition or loss of nationality may not refer to the ethnic origin of persons. If they do , the state concerned must show that making a difference between different ethnic groups does not constitute racial discrimination. In principle, discrimination is presumed to exist in such cases. It is up to the state to overcome the presumption.

Another relevant document is the INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS of 1966. Article 24(3) of the convention guarantees the right of every

child to acquire a nationality. The civil and political rights convention does not improve upon Article 15 of the Universal Declaration. The importance of this provision however, is that it is contained in an international instrument which is binding upon state parties.

Considerably more important for the progressive development of international rules on nationality is the INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN of 1979. The convention provides in Article 9 that state parties should grant women equal rights as men to acquire, change or retain their nationality. In particular, state parties have to ensure that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. These principles were already included in the 1957 Convention on the nationality of married women. But the question remained answered whether equal treatment of men and women in nationality law also implied the same possibility in respect of the "transfer" of nationality to children. Most jurisdictions did not implement the equal treatment rule to such cases. The 1979 convention resolves the issue by stating explicitly in Article 9(2) that state parties shall grant women equal rights as men with respect to the nationality of their children. The consequence is that in the context of the application of the ius sanguinis (nationality by descent) attribution of nationality, both the paternal and maternal descendant of a person must have the same relevance.

Finally the CONVENTION ON THE RIGHTS OF THE CHILD of 1989 is of importance. Art. 7 guarantees the right of a child to acquire a nationality. The article does not state which nationality nor does it guarantee the right of a child to acquire a nationality at the time of birth. The second subsection of the same article calls on state parties to ensure the implementation of the right in accordance with their national laws and their obligations under relevant international instruments, in particular where the child would otherwise be stateless. In view of the previously cited instruments, it may be concluded that the provision does not introduce any additional obligation on the states which have already ratified the conventions in question.

A new element is perhaps introduced by Article 8 of the same convention. Article 8 imposes an obligation on states to respect the right of the child and to preserve his or her identity. This includes nationality as recognized by law without unlawful interference. The second subsection obliges state parties to provide appropriate assistance and protection with a view to speedily re-establishing the identity of a child where a child is illegally deprived of some or all of the elements of his or her identity. It goes without saying that the provision is weak. Nevertheless, state parties should be guided by the principle that persons should have a certain right of self-determination in nationality matters if a person looses or does not acquire a nationality as a consequence of decisions taken by his or her parents or other legal representatives.

It may be concluded that the conventions discussed above do not guarantee the right of children to acquire a nationality at the moment of birth. The conventions simply guarantee the right to acquire a nationality. The conventions prohibit the use of ethnic origin as grounds for the attribution of nationality. The conventions also prohibit the use of ethnic origins to distinguish between the maternal and paternal descendant.

It is remarkable that only the AMERICAN CONVENTION ON HUMAN RIGHTS of 22 November 1969 grants more rights than the conventions mentioned above. Article 20(1) of the American Convention guarantees the right of every person to a nationality. The wording is identical to those of the Universal Declaration and the International Convention on Civil and Political Rights. Article 20(3) of the American convention provides that no one shall be arbitrarily deprived of his or her nationality or of the right to change it. The provision is obviously inspired by Article 15(2) of the Universal Declaration. Article 20(2) of the American convention is of significance. The provision reads: "Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality". The 1961 convention on statelessness uses the same solution in an effort to combat cases of statelessness. However, the convention does not impose a rule similar to Article 20(2) of the American Convention.

The African Charter on Human Rights and the European Convention on Human Rights do not include provisions on nationality. The reason for

this is probably that in Africa and Europe there is less consensus with respect to the grounds for the attribution of nationality at the time of birth than in the Americas. Almost all American countries base their nationality legislation primarily on the ius soli principle: birth on a given state territory is the decisive factor for the acquisition of nationality. In addition rules based on acquisition of nationality by descent (ius sanguinis) are applied on children born abroad. In Africa and Europe the principle of ius soli is used as an important basis for the attribution of nationality by some countries. The nationality legislation of many other countries take as a starting point the principle of ius sanguinis often mixed with some ius soli elements. It is therefore not surprising that a provision like Article 20(2) of the American Convention is lacking in the African Charter and the European Convention.

In principle, African and European states are autonomous in their decision as to whether or not they want to take the descent of a person or the birth of the territory of the state concerned as the primary basis for the attribution of nationality at birth, or a combination of both principles. Even in cases of potential statelessness, this autonomy is maintained. But as noted above this autonomy is limited by human rights principles.

Moreover, both the African Charter and the European Convention contain provisions which have a direct bearing on the grounds for acquisition and loss of nationality. For example, in the African Charter the recognition of the family as the natural unit and basis of society is provided for in Article 18. The right to the security of persons is guaranteed by Article 6, the right to property is guaranteed by Article 14, and the right to work is guaranteed by Article 15. These are fundamental rights recognized in the Charter and closely related to nationality and the connected right to reside in a particular country. Article 12 subsections 4 and 5 of the Charter imply a distinction between nationals and non nationals by giving some guarantees to non-nationals (non nationals may be expelled only by virtue of a decision taken in accordance with the law, and the mass expulsion of non nationals is prohibited). It can be argued, that an arbitrary regulation on the acquisition and loss of a nationality (i.e. of the status of a national) would violate this provision of the Charter. Similar remarks could be made with respect to some of the provisions in the European Convention.

Although nationality is not guaranteed by the European Convention on Human Rights, the progressive development of rules regarding the attribution and loss of nationality is a very serious concern of the Council of Europe. Since the foundation of the Council of Europe, the Council has been active in the field of nationality. It has accepted resolutions and recommendations on nationality rights. In 1963, the Council initiated a CONVENTION ON REDUCTION OF CASES OF MULTIPLE NATIONALITY AND MILITARY OBLIGATIONS IN CASES OF MULTIPLE NATIONALITY. The aim of this convention was to reduce cases of multiple nationality caused by the voluntary acquisition of another citizenship. The convention did not prevent cases of dual or multiple nationality caused by simultaneous attribution of nationalities at the moment of birth. At present, the attitude toward cases of multiple nationality has changed in many Member States of the Council of Europe. This change of attitude was caused by recent demographic developments. In the first place it was caused by the large number of migrants who have settled permanently in the Member States of the Council of Europe and the need to complete their integration. This is particularly true with respect to second-generation migrants. Secondly, the large number of mixed marriages in Member States and the need to facilitate acquisition by one spouse of the nationality of the other spouse and the acquisition by their children of the nationality of both parents, in order to encourage unity of nationality within the same family, played an important role. In the opinion of several Member States of the Council of Europe, the conservation of the nationality of origin is an important factor in achieving these objectives. As a consequence of these developments, a protocol was opened for signature which allows exceptions to be made to the 1963 Treaty. As already noted the 1963 treaty stipulates that the voluntary acquisition of the nationality of another state causes the loss of the previous nationality.

Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, Strasbourg 1993.

The Council of Europe is currently working on a new convention on nationality. The convention attempts to codify the principles accepted by the Member States regarding the acquisition and loss of nationality, and to promote good

practices in the field of nationality and as far as possible to avoid cases of statelessness. In the draft preamble to this new convention, which probably will be opened for signature at the end of 1996 or the very beginning of 1997, the right to respect of family life and the non-discrimination requirement contained in Articles 8 and 14 respectively of the European Convention on Human Rights are mentioned expressly. This fact is remarkable and shows that many principles codified in the new convention are already protected by the human rights convention. The content of this new convention could be of interest to the African Commission. It may provide guidance in an attempt to answer the question as to what extent the right to nationality is protected by the principles of the African Charter.

An analysis of all the interesting provisions of the draft convention on nationality is beyond the scope of this paper. The following important points may be highlighted: The convention includes very general principles, formulates conditions for the attribution and loss of nationality, provides rules to be observed by states in cases of succession and so on.

One example shall be given in order to show the relationship between the general rights guaranteed in the human rights convention and the concrete rules codified by the draft convention. With respect to the attribution of nationality at the time of birth, the non-discrimination and the right to family life principles have to be observed. This should be borne in mind in applying the following rules formulated in Art. 6 of the convention:

"1. Each State Party shall provide in its internal law for its nationality to be acquired *ex lege* by the following persons:

a children one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party, subject to any exceptions which may be provided for by its internal laws as regards children born out of wedlock or born abroad;.....

2. ....

3. Every State Party shall provide in its internal laws for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding 10 years before lodging of an application.

4. Each State Party shall facilitate in its internal laws the acquisition of its nationality for the following persons:

a spouses of its nationals;

b children of one of its nationals, falling under the exceptions of Article 6(1)(a);

c children one of whose parents acquires or has acquired its nationality;

d children adopted by one of its nationals;

e persons who were born on its territory and reside there lawfully and habitually;

f persons who have been lawfully and habitually resident on its territory for a period of time beginning before the age of 18, that period to be determined by the internal laws of the State Party concerned;

g stateless persons and recognised refugees lawfully and habitually resident on its territory."

The above provisions indicate that in view of the importance attached to the respect for family life, the principle of ius sanguinis should play a significant role in the rules for the attribution of nationality at birth. In principle, children should be entitled to the nationality of both parents. This should be so even if it would result in a child having dual citizenship. This conclusion is recognized in the provisions of the convention, particularly Article 14. Under the article, a state shall allow children having different nationalities acquired automatically at birth to retain the nationalities. The avoidance of multiple citizenship is less important than the possession of nationality based on the principle of ius sanguinis. Furthermore, it is important to note that Article 6 makes room for exceptions to be made in cases where children are born abroad.

Nevertheless, the practice of the Member States of the Council of Europe must be borne in mind. Every Member State of the Council of Europe gives its nationality to the first generation of children of nationals born abroad. The United Kingdom and Belgium do not give their nationality to the second generation born abroad. Under certain conditions, the second and sometimes further generations can register as nationals. The possibility of an exception corresponds with the provision in Article 7. Under the Article, one may loose his or her nationality ex

lege or at the initiative of a State Party in case of lack of a genuine link between the State Party and a national habitually residing abroad. The first generation of children born abroad will have a genuine link with the country of nationality of both parents. In view of the guarantee of family life, the nationality of their parents has to be attributed to them. Not to grant them the nationality of the parents would be inconsistent with the European Convention on Human Rights. In the case of a second or further generation born abroad, such a link may be lacking. In such a case, non attribution of nationality may be allowed.

It is striking that Article 6 pays special attention to the right of a person to acquire the nationality of the country where (s)he was born or was living permanently. This is in part a recognition of the fact that persons feel at home in the country where they were educated and used to live permanently. This feeling of being on "home-ground" has to be recognised in nationality law, because by granting nationality, the right to live in a certain country is guaranteed.

In light of the observations made on the draft European convention, and in view of the principles set forth in the European Convention on Human Rights and the African Charter on Human and Peoples' Rights, the following conclusions may be made: With respect to Europe one can argue that many rules contained in the draft convention can and probably will be protected by the European Human Rights Convention. The same can be said for Africa. The principles enshrined in the African Charter do not allow African states to arbitrarily regulate the attribution and loss of nationality. The grounds for acquisition and loss of nationality of African states have to reflect the principles of the Charter.

ANNOUNCEMENT

In celebration of its first anniverssary, the Africa Legal Aid is organizing a conference preceding its first Annual Dinner which will be held in the early part of 1997 on a date to be announced later. The meeting cannot take place around 21 October 1996 as previously announced. This is because the African Commission on Human Rights will celebrate the 10th anniversary of the coming into force of the African Charter around the same period in Mauritius.

The theme of the conference will be:

The Legal Professional and the Protection of Human Rights in Africa

The purpose of the conference is to provide a forum for African and European lawyers to exchange information and experiences. Such an exchange could enrich the work of both African and European lawyers.

In addition, the conference may also foster co-operation with the Africa Legal Aid. Speakers will include human rights lawyers from various African countries, officers from United Nations Agencies, members of academic institutions, human rights activists and government representatives from African countries.

All those who are working for law firms, law faculties or other relevant institutions and who are interested in participating in the event, or who may wish to obtain further information, can contact:

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